DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Concerning	)	
Children's Television Programming	)	**MM Docket No. 93-48**
	)	
Revision of Programming Policies	)	
for Television Broadcast Stations	)	

COMMENTS OF CBS INC.

Howard F. Jaeckel
Nicholas E. Poser
51 West 52 Street
New York, New York 10019

Its Attorneys

October 16, 1995

TABLE OF CONTENTS

SUMMARY

CBS supports many of the proposals made by the Commission in this proceeding to enhance stations' compliance with the Children's Television Act. In particular, we support the proposals intended to increase the flow of information to the public about the availability of educational and informational children's programming, including those proposals to have licensees provide information about such programs to publishers of programming guides, identify in their quarterly reports the name of and method for contacting the person responsible for collecting comments on the stations' compliance with the Act, and describe in their reports how their programs meet the definition of "core" educational and informational programming.

CBS also believes the establishment of a more particularized definition of programming "specifically designed" to serve children's educational and informational needs is appropriate. The definition adopted, however, must be broad enough to encompass programming that furthers the emotional and social development of children, which Congress clearly intended to be included in any definition of "core" educational and informational programming. In addition, as contemplated in the legislative history of the Act, the Commission must defer to the reasonable judgments of licensees that particular programming is educational or informational.

But CBS cannot support the proposals to establish quotas for educational and informational programming or license renewal processing guidelines, which are the effective equivalent of quotas. The Children's Television Act establishes no quotas for educational and informational programming, and the Act's legislative history, while contemplating that every

station would broadcast some qualifying programming, clearly demonstrates Congress' intention not to set quantification requirements. In the course of promulgating regulations pursuant to the Act, the Commission itself has twice reached the conclusion that programming quotas would be inconsistent with congressional intent, and over the years has repeatedly rejected similar proposals, viewing them as contrary to the public interest and constitutionally suspect.

The adoption of mandatory programming requirements would raise serious First Amendment problems. Only last year, the United States Supreme Court reiterated that the Commission's "oversight responsibilities do not grant it power to ordain any particular type of programming that must be offered by broadcast stations." Turner Broadcasting System v. FCC, 114 S. Ct. 2445, 2463 (1994). At a maximum, the Commission may intrude on program content only if its regulations constitute a narrowly tailored means to achieve substantial governmental interests. On the existing factual record, there is no justification for the imposition of programming quotas under the applicable legal standards. As the Commission essentially acknowledges in the Notice, there is insufficient evidence on which to conclude that reasonable amounts of educational and informational programming are not currently available to parents and children. To the contrary, the evidence demonstrates that the average commercial broadcast station is broadcasting substantial amounts of educational and informational programming, and that the amount of such programming broadcast has been increasing consistently since the passage of the Act. Moreover, CBS submits that when the overall video marketplace is considered -- including programming disseminated by cable networks, public television stations and other sources -- there can be little doubt that reasonable amounts of educational and informational programming are now available.

As an alternative to taking further regulatory action now, the Commission proposes that it might monitor the availability of children's educational and informational programming over a specified period of time. While CBS believes that such monitoring would be useful, its purpose should be to assess the availability of qualifying programming in the video marketplace as a whole, and to determine whether all licensees are fulfilling their statutory obligation to present some qualifying programming. If such a study shows there is reasonable opportunity in the overall television marketplace for parents to select educational and informational programming for their children's viewing, there can be no possible justification for imposing programming quotas.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Concerning	)	
Children's Television Programming	)	**MM Docket No. 93-48**
	)	
Revision of Programming Policies	)	
for Television Broadcast Stations	)	

COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking ("Notice") in this proceeding, in which the Commission proposes rule changes intended to facilitate compliance with the Children Television Act of 1990 ("Act") and to strengthen the functioning of the children's television marketplace.

I. Introduction and Overview.

The Children's Television Act, enacted only five years ago, established limits on the amount of commercial material that may be broadcast during children's programming and requires the Commission to consider in reviewing applications for license renewal whether a licensee "has served the educational and informational needs of children through the licensee's overall

programming, including programming specifically designed to serve such needs."[1] Passage of the Act was proceeded by lengthy discussions between Congress, broadcasters[2] and others, which resulted in "a thoughtful compromise"[3] reflecting both the views of broadcasters and children's television advocates. As enacted, the Act represented a careful balancing of interests, assuring that every commercial television station contributes to the availability of educational and informational programming for children, while at the same time minimizing government intrusion into program content.

Thus the Act, while setting specific limits for commercial messages in children's programming, does not establish any quota of educational and informational programming that must be broadcast. The legislative record clearly demonstrates Congress' intention not to prescribe such "quantification standards," but rather to leave to broadcasters the greatest possible flexibility in determining how to discharge their programming obligations to children under the Act. Only four years ago, in adopting rules to implement the Act, the Commission twice expressly found that the adoption of quantification standards would conflict with the congressional intent in adopting the Act.

Against this background, the Commission in this proceeding proposes revisions to its rules "to facilitate licensee compliance with the [Children's Television Act], and to strengthen the functioning of the children's television marketplace." (Notice at ¶3). In part, the Commission

---

1 47 U.S.C. §303b(a)(2).

2 Broadcasters were praised by sponsors of the legislation "for their cooperation and assistance" and "for their efforts to help craft legislation to further the interests of this Nation's children." 136 Cong. Rec. S10122 (daily ed. July 19, 1990) (remarks of Sen. Inouye and Sen. Hollings).

3 136 Cong. Rec. S10127 (daily ed. July 19, 1990) (remarks of Sen. Metzenbaum).

proposes to achieve these goals by measures designed to provide more information to the public about licensee compliance efforts and by clarifying and narrowing its definition of "core" educational and informational programming for children. However, the Commission also broaches the possibility that it may adopt mandatory rules, or license renewal "processing guidelines," specifying the particular amounts of such programming which would be required to satisfy the requirements of the Act. The Commission also sets forth a proposal, in lieu of mandatory rules or processing guidelines, to monitor for a specified period of time the amount of programming specifically designed to serve the educational and informational needs of children which is being broadcast by commercial television stations.

With several qualifications, CBS generally supports the Commission's proposals for the adoption of new rules for conveying information to the public and for a clarified definition of educational and informational children's programming. However, we oppose the adoption of mandatory programming rules or of "processing guidelines," which we believe would have precisely the same effect as mandatory rules.

As explained in detail below, CBS opposes the adoption of such rules or guidelines on several grounds. First, the legislative history clearly shows that such rules would be inconsistent with the congressional intent in enacting the Children's Television Act, as the Commission itself has twice expressly found. And while the Commission suggests that the Congress did not preclude it from adopting such rules as a matter of its own discretion, it is notable that the Commission has over the years repeatedly rejected similar proposals on the ground that they would not serve the public interest.

More broadly, there is no showing on the present record that such rules are necessary to achieve the purposes of the Act. In its Notice, the Commission expressly acknowledges that the record evidence is presently insufficient to support a conclusion that the educational and informational needs of children are not being met by commercial broadcasters. (Notice at ¶ 17). Much less is there any indication, when the offerings available on public television, cable and videocassette are considered, that parents do not presently have an adequate opportunity to select for their children's viewing an ample variety of educational and informational children's programs. On this record, there is no basis for the Commission to adopt new regulations which would uniquely intrude on the editorial discretion of broadcast licensees -- regulations of a type which the Commission has repeatedly rejected in the past.

Finally, and most importantly, the adoption of quantitative programming standards would raise serious First Amendment questions. Only a year ago, the Supreme Court affirmed that while the Commission is permitted to "place limited content restraints, and impose certain affirmative obligations on broadcast licensees," its "oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." Turner Broadcasting System v. FCC, 114 S. Ct. 2445, 2457, 2463 (1994). Moreover, even under the most expansive reading of the Commission's authority, it may regulate broadcast content only where such restrictions are "narrowly tailored to further a substantial government interest." FCC v. League of Women Voters, 468 U.S. 364, 380 (1984).[4] In the circumstances here presented,

---

[4] There is considerable question as to whether the League of Women Voters standard is the appropriate one to apply in this proceeding. In Syracuse Peace Council, 2 FCC Rcd 5043 (1987), the Commission expressed the view that technological advances warrant reconsideration of the lesser First Amendment standard for broadcasters established in Red Lion

(continued...)

where there is insufficient evidence to conclude that the marketplace as a whole is not providing an adequate amount of educational children's programming for interested parents and children, the adoption of inflexible standards requiring that every commercial television station in the United States present a fixed amount of such programming cannot be said to be "narrowly tailored" to achieve such an interest.

While CBS opposes the proposals to impose quantitative programming requirements or processing guidelines, it believes that the Commission's proposal to monitor the amount of educational and informational programming broadcast over a specified period of time would be useful. The purpose of such monitoring, however, should be to assess the overall availability of educational and informational programming in the video marketplace and to determine whether all licensees are presenting at least some qualifying programming. Such a study would properly focus on the only question that can legitimately be of concern to parents and this Commission -- whether there is a reasonable opportunity, in the marketplace as a whole, for parents to select educational and informational programs for their children's viewing. If this question is answered in the affirmative, there can be no justification for the imposition of uniform government requirements as to the minimum amount of such programming which should be presented by every commercial television station.

---

[4](...continued)
Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Accordingly, CBS respectfully submits that the Commission should test the proposed imposition of mandatory programming requirements under the strict scrutiny standard normally applied to content-based regulations.

II. With the Exception of Mandatory Programming Requirements and Processing Guidelines, CBS Generally Supports the Proposed Revisions of the Children's Programming Rules.

A. Proposed Changes to Improve the Flow of Information to the Public Will Facilitate Enforcement of the Children's Television Act By Permitting Market Forces To Judge Licensee Performance.

CBS generally supports the changes proposed by the Commission designed to increase the flow of information to the public about available educational and informational children's programs. These proposals would both provide parents a better opportunity to guide their children's television viewing and facilitate the monitoring of licensees' compliance with the Act by community groups. CBS wholeheartedly agrees with the principle the Commission cites in support of these proposals that "judgments of the quality of a licensee's programming, educational or otherwise, are best made by the audience, not by the federal government." (Notice at ¶4). Increased information appropriately will "allow the Commission to rely more on marketplace forces as a critical mechanism for achieving the goals of the [Children's Television Act]." (Notice at ¶22).

For these reasons, with minor exceptions,[5] CBS supports the proposal to have licensees provide information regarding programs specifically designed to serve the educational and

[5] While it is feasible to provide information to program guide publishers for regularly scheduled programs, it would be burdensome to do so for special programming. CBS suggests that the requirement to provide this information to publishers not be extended to programming that is not regularly scheduled. Of course, credit toward meeting the obligations imposed under the Act should be accorded such special programming, whether or not it appears in program guides.

informational needs of children to publishers of programming guides.[6] (Notice at ¶24). We also have no objection to the proposal to require licensees to include in their quarterly children's programming reports the name of and method for contacting the person responsible for collecting comments on the station's compliance with the Act. (Notice at ¶25). Furthermore, we support the proposal to require licensees to provide a brief description in their children's programming reports of how particular programs meet the definition of "core" programming that the Commission adopts in this proceeding. (Id.)

CBS does not, however, support the proposed requirement that licensees be required to announce on the air the availability of their children's program reports in their public files. (Notice at ¶26). In CBS's experience, it is quite rare for members of the public to request to review materials in the public files of its owned and operated television stations. This is also the case at license renewal time, when Commission rules require on-air announcements as to the availability of a station's renewal application in its public file. Moreover, those groups which are interested in a television station's children's programming are highly likely to be independently aware of the Commission's public file rules. We therefore believe that a requirement of an on-air announcement is likely simply to constitute an unnecessary burden on licensees, which will not result in greater public involvement with a station's children's programming than would otherwise have existed.

---

[6] CBS does not believe that the use of on-air icons would serve any useful purpose. Such icons clearly will not encourage viewing of the programs in question by children, and also cannot serve as an aid to parents in helping their children to pre-plan their viewing, as can published materials.

B. A More Particularized Definition of Programming "Specifically Designed" to Serve Children's Educational and Informational Needs Is Appropriate.

CBS generally supports the Commission's proposals to provide a more "particularized definition of programming 'specifically designed' to serve children's educational and informational needs," which the Commission describes as "core" programming. (Notice at ¶35). Our support, however, is based on the following assumptions.

CBS agrees that programming relied on by licensees as meeting the "specifically designed" requirement should have the provision of educational or informational material as "a significant purpose." (Notice at ¶37). Indeed, CBS proposed a similar standard in its comments in response to the Notice of Inquiry ("NOI").[7] But as CBS has pointed out previously,[8] in adopting the Act, Congress clearly intended that a broad range of programming would qualify as being "specifically designed" to serve children's "educational and informational needs." On the precise issue of "specifically designed" programming, the Act's chief Senate sponsor, Senator Inouye, stated that:

> Educational and informational needs encompass not only intellectual development, but also the child's emotional and social development. Pro-social programming which assists children to discover more about themselves, their families, and the world would qualify.[9]

Any Commission definition of "core" programming meeting the requirements of the Act -- i.e., programming "specifically designed" to serve the educational and informational needs of children

---

[7] See Comments of CBS Inc. in MM Docket No. 93-48, at 35, May 7, 1993 ("CBS Notice of Inquiry Comments")(whether programming may be defined as educational or informational should turn on "whether the licensee can reasonably conclude that the program, taken as a whole, has substantial educational, informational or pro-social value to children....")

[8] See CBS Notice of Inquiry Comments at 29-35.

[9] 136 Cong. Rec. S10122 (daily ed. July 19, 1990).

-- must therefore be consistent with the congressional intent to include within this category programming which furthers the emotional and social development of children.

As the Commission has previously recognized,[10] Congress clearly believed that programming of this kind specifically and directly serves the "educational and informational" needs of children, and thus should qualify under the Act. The Senate Report identified a range of programs as "educationally important" on the basis that they "encourage pro-social behavior" and serve informational needs.[11] A definition in keeping with the intent expressed by Congress must recognize as "core" programming that which has significant educational, informational or pro-social value.[12]

---

[10] See Report and Order In the Matter of Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, 6 FCC Rcd 2111, 2114-15 ("Report and Order"), recon. granted in part, 6 FCC Rcd 5093 (1991) ("Memorandum Opinion and Order").

[11] S. Rep. No. 227, 101st Cong., 1st Sess. 7-8 (1989) ("Senate Report"). For example, the Senate Report praised CBS's PEE WEE'S PLAYHOUSE, which it described as "includ[ing] entertainment and informational material," for encouraging pro-social behavior. The report cited other examples of "worthwhile children's programs", which similarly combined entertainment and encouragement of pro-social values. Id.

[12] It also bears emphasis that notwithstanding any further particularization of the definition of programming "specifically designed" to serve children's educational and informational needs, programming that does not meet the definition can contribute significantly to a licensee's fulfillment of its obligations under the Act. The Act itself states that broadcast of specifically designed programming is a part of the licensee's obligation to "serve[] the educational and informational needs of children through the licensee's overall programming." 47 U.S.C. §303b(a)(2). The legislative history of the Act is unequivocal in stating that licensees are to be afforded the "greatest possible flexibility" in how they discharge their obligation, see 136 Cong. Rec. S10121 (remarks of Sen. Inouye), and that programming not "specifically designed" for children can contribute to their educational and informational needs. See Senate Report at 17; see also see H.R. Rep. No. 385, 101st Cong., 1st Sess. at 11 (1989) ("House Report"). The adoption of the more specific definition should not be used as a basis for ignoring the contribution that other programming may make toward meeting the licensee's obligations.

In addition, in light of Congress' "expect[ation]" in enacting the statute that "the Commission will continue to defer to the reasonable programming judgments of licensees" in assessing compliance with the Act,[13] we believe the Commission must make clear it will accept a licensee's reasonable judgment that a particular program does in fact have significant educational or informational value.[14] Indeed, to do otherwise would draw the Commission deeply into the review of licensee programming judgments, thus raising sensitive First Amendment questions. See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 127 (1973).[15]

With these clarifications, CBS supports the Commission's proposed definitional standards for programming "specifically designed" to serve the educational and informational needs of children. In particular, CBS supports the Commission's proposed time frame for the broadcast of qualifying programming -- i.e., 6AM to 11PM. As the Commission has noted, audience data

---

[13] 136 Cong. Rec. S10122 (remarks of Sen. Inouye); see also 136 Cong. Rec. S10127 (remarks of Sen. Inouye) ("To fulfill the required standards, each licensee must demonstrate that some educational and informational programming targeted specifically at children was provided. Of course, it is expected that the FCC, in evaluating the licensee's compliance with this provision, will defer to the licensee's judgement to determine how to serve the educational and informational needs of children in its community.")

[14] The Commission suggests that to meet the definition of "core" programming, licensees may be required to specify the target child audience of their programs. (Notice at ¶36). We believe that imposition of such a requirement would be unjustified. Nothing in the Children's Television Act requires licensees to target their educational and informational programming to discrete segments of the child audience. Moreover, a requirement to determine the target audience would be unduly burdensome on stations, most of which do not have the resources to hire experts to determine the precise ages for which their qualifying programming is appropriate.

[15] See also Senate Report at 17 (legislation meets constitutional requirements because, inter alia, "[i]t does not exclude any programming that does in fact serve the educational and informational needs of children; rather the broadcaster has discretion to meet its public service obligation in the way it deems best suited"); see also House Report at 12.

indicate that children aged six to seventeen watch television most during prime time. Those data also indicate that substantial numbers of children are in the viewing audience between 6 and 7AM.[16] While the Commission has expressed concern that not all educational children's programs be routinely relegated to the 6 to 7AM hour, the record evidence does not suggest that any regulatory action is necessary to prevent this. A study prepared by the National Association of Broadcasters found that, during Fall (October, November and December) 1994, over four-fifths (81.4 percent) of programs identified by licensees as educational and informational were broadcast after 7AM.[17] For the same period, the study found that only 15.8 percent of educational and informational programming aired between 6:00AM and 7:00AM.[18] However, if the Commission nonetheless feels compelled to take some action to allay its concerns in this regard, we believe it should simply state that licensees must broadcast some qualifying standard-length programming after 7AM, and that licensees meeting this standard will receive full credit for all their qualifying programming broadcast during the hours of 6AM-11PM.

---

[16] There are approximately one and one-half million children age two to 11, about five percent of all children, watching television Monday to Friday at 6:00 AM, and approximately 2.4 million children age two to 11, about 6.3% of all children, watching television Monday to Friday at 6:30 AM. See Comments of the National Association of Broadcasters, MM Docket No. 93-48, dated July 15, 1994, at 4 ("1994 NAB Comments"), citing Kids 2-11 Television Viewing, Nielsen Peoplemeters, 4Q 1993.

[17] See "The 1990 Children's Television Act: A Second Look On Its Impact," October 16, 1995 at 11 ("1995 NAB Study"), submitted with Comments of the National Association of Broadcasters, MM Docket No. 93-48, dated October 16, 1995. This represents an increase in the percentage of educational and informational programming airing after 7:00AM from the 77.6 percent figure reported by the NAB for Fall 1993. Id.

[18] 1995 NAB Study at 11. As mentioned above, significant numbers of children are in the audience during this one hour period. See footnote 16, supra.

Finally, as indicated in our comments in response to the NOI,[19] we agree that a licensee must present some qualifying standard-length programming in order to meet the Act's requirements. We again note our belief, however, that short segment programming can have real value for youngsters, and should accordingly be entitled to full consideration in assessing a station's overall compliance with the Act.

III. The Commission Should Not Adopt Quantitative Programming Standards or Processing Guidelines.

While CBS shares the Commission's concern with ensuring the availability of quality educational and informational programming for children, it cannot support the imposition of quantitative standards or processing guidelines specifying the amounts of such programming which commercial television stations must air to comply with the requirements of the Children's Television Act. The adoption of such rules would be manifestly inconsistent with Congress' intent, which was to give broadcasters maximum discretion and flexibility in determining how they would fulfill their obligation to serve the educational and informational needs of children. On the present record, there is no basis for the Commission to adopt quantitative standards in the face of the clear disinclination of Congress to impose such requirements. As discussed below, that record is devoid of any evidence of a demand for educational and informational programming that is unmet by the existing video marketplace, in which ample opportunities exist for the selection and viewing of such programs by interested parents and children. In the absence of such evidence, the imposition of unprecedented programming quotas which would uniquely intrude on

---

[19] See CBS Notice of Inquiry Comments at 6-7, and n.7.

the editorial discretion of broadcasters cannot be justified. Finally, and most seriously, compelling the broadcast of specified amounts of government-approved programming in order to secure license renewal would violate licensees' First Amendment rights.

As we now show, in light of these considerations, there is insufficient reason for the Commission to depart from its longstanding rejection of quantitative requirements.

A. Quantitative Requirements Would Be Inconsistent With the Intent of Congress in Enacting the Children's Television Act.

As noted above, while the legislative history of the Act clearly indicates that the Congress intended that each commercial television station broadcast "some" programming specifically designed to serve the educational and informational needs of children,[20] it offers no support for the adoption of rigid programming quotas applicable to every commercial television station in the United States. To the contrary, it is clear that such requirements were, at the least, not favored by Congress. In the face of Congress' expressly articulated intent to afford "the licensee the greatest possible flexibility in how it discharges its public service obligations to children,"[21] the proponents of mandatory programming quotas face a heavy burden to demonstrate that the adoption of such requirements is essential to accomplish the objectives of the Children's Television Act.

---

[20] House Report at 17 ("The Committee would of course, expect that stations will provide some programming intended primarily to serve the educational and informational needs of children") (emphasis added).

[21] 136 Cong Rec S10121 (remarks of Sen. Inouye).

Congress' intent to provide licensees broad latitude in meeting their responsibilities under the Act is apparent throughout the legislative history. Thus both the House and the Senate made plain that no programming that "does in fact serve the educational and informational needs of children" should be excluded from the determination of whether a licensee has met its obligations under the Act.[22] Further, both the Senate and House Reports, and the floor debate, specifically indicated that the Commission was to consider general audience programming with educational and informational value to children -- including entertainment programming -- in determining whether a broadcast station had adequately served the educational and informational needs of children.[23] Congress also provided that beyond the licensee's own programming, non-broadcast efforts of licensees were also to be considered in assessing whether a licensee's overall performance met the requirements of the Act.[24] And most significantly, both the Senate and House Reports, and remarks on the floor by sponsors of the legislation, state that the "appropriate mix" between general audience programming and programming specifically designed for children is to be "left to the discretion of the broadcaster".[25]

---

[22] Senate Report at 17; House Report at 12.

[23] Senate Report at 17, 23; House Report at 11, 17; 136 Cong. Rec. S10121 ("general purpose programming ... can have an informative and educational impact... and thus can be relied upon by broadcast licensees as contributing to meeting their obligation in this important area") (remarks of Sen. Inouye).

[24] 47 U.S.C. §303b(b)(1) and (2); 136 Cong. Rec. S10122 (remarks of Sen. Inouye); see also Senate Report at 8 (commenting favorable on CBS's "Read More About It" project and CBS's distribution of "Teachers' Guides" in connection with CBS Schoolbreak Specials).

[25] Senate Report at 23; House Report at 17; 136 Cong. Rec. S10122 (remarks of Sen. Inouye).

The broad and flexible approach clearly envisioned by Congress toward assessing broadcaster performance under the Act is hardly compatible with the adoption of a uniform quantitative requirement as the primary benchmark for determining licensee compliance with the statute. There is no need, however, to infer the attitude of Congress to such requirements from the overall spirit of the legislation. Both the Senate and House Reports expressly stated that their respective Committees did not intend that the Commission "interpret [the Act] as requiring or mandating a quantification standard governing the amount of children's educational and informational programming that a broadcast licensee must broadcast to pass a license renewal review."[26] As is acknowledged in the Notice, the Commission has twice interpreted this legislative record to reflect that "a quantitative standard would be contrary to Congressional intent."[27] When it originally adopted its Report and Order implementing the Act, the Commission stated:

> The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station. We thus decline to establish any minimum programming requirement for licensees for renewal review independent of that established in the Act.[28]

---

[26] House Report at 17; see also Senate Report at 23, and 136 Cong. Rec. S10122 (remarks of Sen. Inouye).

[27] Notice at ¶54.

[28] Report and Order, 6 FCC Rcd at 2115, ¶24.

On reconsideration, in response to renewed calls for the imposition of quantitative standards, the Commission reiterated even more firmly that such requirements were contrary to Congress' intent:

> The April 12 Order stated that licensees must air some educational and informational programming "specifically designed" for children ages 16 and under in order to satisfy renewal review. We declined to adopt minimum quantitative criteria, finding that the Act imposes no such quantitative standards, and the legislative history indicates that none should be imposed. NABB urges, as it did in its comments, that the Commission should adopt quantitative processing guidelines. We agree with NAB, however, that such guidelines, even if they do not automatically result in sanctions if violated, conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion.[29]

Given the Commission's previous and recent conclusion that quantitative programming requirements would be incompatible with the legislative history of the Children's Television Act, it would face a heavy burden now to justify a contrary interpretation of the statute.[30] This is especially so in light of the First Amendment issues which would be raised by such an interpretation. The Supreme Court has unequivocally held that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988) (citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-510 (1979)). This rule of statutory construction is manifestly applicable here.

Thus, even without ultimately resolving the First Amendment issues presented by the content regulation of licensee programming now contemplated by the Commission, it is beyond

---

[29] Memorandum Opinion and Order, 6 FCC Rcd at 5100, ¶40 (footnotes omitted).

[30] See cases cited at footnote 45 and accompanying text.

doubt that quantitative requirements at the very least raise serious constitutional questions.[31] Given that there is a construction of the Act that avoids constitutional questions and is not "plainly contrary to the intent of Congress" -- in fact, it is the construction clearly favored in the legislative history -- there is no justification for adopting a construction that the Act authorizes the imposition of quantitative, content-based requirements. See DeBartolo, 485 U.S. at 587 (Court adopts construction which "makes unnecessary passing on the serious constitutional questions that would be raised by the [agency's] understanding of the statute.") Any reviewing court thus would be obliged to reject a Commission interpretation that the statute permits quantitative requirements, without even deciding the ultimate question of the constitutionality of such requirements. In these circumstances, it would be inappropriate for the Commission to take the unjustifiable step of imposing them.

---

[31] As set forth below, there is a compelling case that quantitative requirements for children's educational and informational programming would violate licensees' First Amendment rights. See pp. 26-32, infra. But even if it were to conclude that the First Amendment question ultimately would be resolved in favor of its authority to adopt quantitative requirements for educational children's programming, the Commission's own statements over many years reflect its understanding that a serious constitutional issue is inherent in the contemplated action. For example, the Notice itself acknowledges that quantitative requirements are likely to be "found to be content-based restrictions on speech." (Notice at ¶66). See also, e.g., Children's Television Report and Policy Statement, in which the Commission supported its decision not to impose quantitative requirements for children's educational and informational programming by stating, "we are involved in a sensitive First Amendment area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible." 50 FCC 2d 1, 6 (1974) ("Children's Report"). In denying reconsideration of that decision, the Commission further stated, "[i]n our view, the adoption of [mandatory] rules would involve the government too deeply in program content questions, which raise serious constitutional problems." Action for Children's Television, 55 FCC 2d 691, 693 (1975), aff'd, Action for Children's Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977). See also Children's Television Programming and Advertising Practices, 96 FCC 2d 634, 652 (1984) (Commission, in refusing to adopt mandatory children's programming requirements, stated that "[n]umerous judicial opinions have also noted that serious First Amendment concerns are raised by [programming requirements or quotas].")

Even leaving aside these difficulties with an interpretation of the Act which would permit the adoption of mandatory programming rules, it is clear at a minimum that Congress contemplated that the Commission would take a broad and flexible approach, rather than one based on rigid quantitative standards, in enforcing the Act. While the Commission now suggests that the legislative history does not preclude its adoption of quantitative rules (Notice at ¶54), it is at least certain that Congress was strongly disinclined to such an approach. That disinclination, should, we submit, be decisive in light of the significant legal and policy problems which the adoption of such rules would present, and the lack of any showing on the present record that such rules are necessary.

B. The Commission Should Follow a Marketplace Approach in Assessing Whether the Goals of the Children's Television Act Are Being Met.

Although Congress clearly intended that every commercial television station contribute to the availability of children's educational and informational programming by presenting some programming of this type, the Commission should bear in mind that what ultimately matters to parents and children is the overall availability of such programming in the entire video marketplace -- not the number of hours presented by any particular station. Accordingly, it is this overall marketplace availability which the Commission should consider in assessing the need for further regulatory action.

Today, the availability of educational children's programming to the nation's households is unparalleled. Nearly two-thirds of these households subscribe to cable, and thus have access to services such as the Nickelodeon cable network and the Disney Channel. Eighty-nine percent of

television households have VCRs,[32] and may select at will from an abundant supply of prerecorded children's programs. For these households, the availability of educational and informational children's programming is truly only limited by marketplace demand.

While many households do not have cable[33] or VCRs out of choice, there are, of course, some which cannot afford to do so. But virtually all homes have available the outstanding educational children's programs which appear on public television. No realistic assessment of the children's television marketplace can ignore these offerings, which include programs such as SESAME STREET, MR. ROGERS' NEIGHBORHOOD, WHERE IN THE WORLD IS CARMEN SAN DIEGO?, BARNEY, GHOSTWRITER, PUZZLEPLACE and READING RAINBOW.

Consideration of these sources of educational children's programs dramatically highlights the inadequacy of the present record to justify the imposition of unprecedented quantitative programming rules. Moreover, it is clear that commercial broadcasters are doing their part, as intended by the Act, to ensure that educational and informational programs for children are reasonably available in the overall television marketplace.

---

[32] See An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, Economists Incorporated, submitted on behalf of Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Westinghouse Broadcasting Company in MM Docket Nos. 91-221 and 87-7 (May 17, 1995) at Appendix A, p. A-13.

[33] Cost does not appear to be a significant obstacle to access to cable for any segment of the public. Even for those with incomes of less than $10,000, cable penetration is 46% of television households, a level not far below the national figure of 62%. See "An Economic Analysis of the Prime Time Access Rule," at 8, Economists Incorporated (March 7, 1995), submitted by CBS jointly with Capital Cities/ABC, Inc. and the National Broadcasting Co., Inc. in In re: Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No 94-123.

In its original Notice of Inquiry in this proceeding -- released more than two years ago when the Act had been in effect for only a relatively short time -- the Commission acknowledged that "practically all" license renewal applications filed during the previous cycle had identified at least some regularly scheduled, standard-length children's programming broadcast in compliance with the Act.[34] And while criticized by the Commission for various procedural flaws, all of the studies submitted in response to that Notice found that commercial television stations are, on average, broadcasting several hours of educational children's programming per week.[35]

Additional data is now available to show that commercial television stations are responding in a significant way to the adoption of the Children's Television Act. In an effort to respond to the Commission's criticism of its 1994 Study,[36] the NAB has supplemented its data regarding educational and informational programming broadcast during Fall 1993 and gathered extensive data regarding programming broadcast during Fall 1994. The NAB's new study

---

[34] Notice of Inquiry in MM Docket No. 93-48, 8 FCC Rcd 1841, 1842 (1993).

[35] See Notice at ¶16. All the studies cited support the conclusion that significant amounts of educational and information children's programming are being broadcast, and that the amounts have been increasing since the passage of the Act. Despite his skepticism about some of the programming listed, Dr. Dale Kunkel found an average of 3.4 hours per week in a study based on license renewal applications filed in 1992. The NAB's study found the average commercial station aired slightly more than 2 hours per week of specifically designed children's programming in 1990 and 3.6 hours by the Fall of 1993. INTV's study found the average independent station aired 4.64 hours per week in the first quarter of 1994. And even Squire Rushnell, who is critical of the networks' performance in this area, found an increase in network educational and informational programming under the Act from 1.75 hours in 1990 to 5.75 hours (9 hours, if Fox is included) for the 1994-95 season.

[36] "The 1990 Children's Television Act: Its Impact On The Amount Of Educational and Informational Programming" ("1994 NAB Study"), submitted with 1994 NAB Comments.